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WHO IS JESSICA'S MOTHER? DEFINING MOTHERHOOD THROUGH REALITY

SUELLYN SCARNECCHIA*

The recent Baby Jessica case and others like it have renewed the nature versus nurture debate in family law. Baby Jessica's biological parents, the Schmidts, sought to obtain permanent custody of their daughter after giving her up for adoption to the DeBoer family. Their argument was one that found its basis in biology and the idea of a traditional family.

On the other hand, with the assistance of Professor Scarnecchia, the DeBoers argued that it was more important for Jessica's overall health to remain with her primary caretakers of two years. Courts, however, have taken a more traditional view of this complex situation. Historically, there has been great resistance to the argument that the best interests of the child should rule over a biological relationship. As a result, the Schmidts won custody of Baby Jessica.

In the following speech, Professor Scarnecchia articulates the limitations of a biological approach to child custody cases. She argues for a children's rights-based decision making process in family law.

Professor Scarnecchia presented this speech at The American University Journal of Gender & the Law symposium "Gender, Family and Change: Developments in the Legal Regulation of Family Life" on April 9, 1994.

In the Baby Jessica case, I represented Jan and Robby DeBoer, the couple who took custody of Jessica when she was a few weeks old and parented her until August 2, 1993, when she was two and a half years old.[1] They were Jessi's Mom and Dad every day of her life for those

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1. DeBoer v. Schmidt, 502 N.W.2d 649, 652 (Mich.), *stay denied sub nom.* DeBoer v. DeBoer 114 S. Ct. 1 (1993) (stating that the DeBoers were given custody of Jessica on February 25, 1991, when the parental rights of Cara Clausen were terminated).

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two and a half years, then she moved to Iowa and they will probably not see her again until she is grown and visits them.

There are two moments in my representation of Jan and Robby that I want to share with you, and then I will talk with you about what I have learned about defining motherhood through participating in this very difficult and sad case.

The first incident occurred in the office of Robby and Jan's therapist. My clients and I were meeting with their personal therapist and with a child therapist who had previously evaluated Jessica and gave us advice about how to handle the transfer of Jessi from one set of parents to the other. By the time of this meeting, we had already lost in the Michigan Supreme Court[2] and we knew that Jessi would leave Jan and Robby on August 2, unless the United States Supreme Court granted a stay.

Robby spent the majority of her hours during the prior two years with Jessica: feeding her, dressing her, holding her, and loving her. During the meeting, Robby turned to me, clearly frustrated by my contributions to the meeting, and said, "I don't know if you really believe that I am Jessica's mother. Do you really believe that I am her mother? If this was your son, what would you do?" I could not answer her. Finally, I said something like, "I'm not in your situation. I don't know what I would do." I felt very cornered and challenged. I remember trying to define my professional role to explain why my answer to Robby's question was not important. It was not until the second incident that I knew the true answer to Robby's question.

The second incident happened a few weeks after I carried Jessi out of Robby's house and delivered her to Dan and Cara Schmidt. Robby came over to my house to talk about some decisions that were still pending. We sat down in my dining room and I went to pull some Diet Cokes out of the refrigerator. Robby started to talk again about being Jessi's real mother. Suddenly, it all came together for me. I told her that as a lawyer I never truly believed that she was Jessi's mother. I had been extremely well trained to remain objective, and I believed that I could not argue the case if I did not remain objective. I had to remain convinced that Cara Schmidt had an arguable legal basis for claiming that she was Jessi's mother, or I would not be able to see the legal arguments on the other side of the case. I had to be a lawyer. In being a lawyer, I forced my mind to suspend judgment about who was Jessi's mother. After all, that is

2. *DeBoer*, 502 N.W.2d at 667 (ordering the transfer of custody to the birth parents, Dan and Cara Schmidt).

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what we were arguing about in the case. No one knew; the courts would have to decide.

I started crying then, in the archway between my dining room and kitchen, when I told Robby that I never really believed that she was Jessica's mother until I saw her walk into my house alone that day, without Jessi. Then, all of what I knew as a person, not as a lawyer, came flooding back. There was nothing but a mother-daughter relationship between Robby and Jessi. When Robby lost Jessi, she lost her daughter. When Jessi lost Robby, she lost her mother. I realized that one part of my brain was functioning as a lawyer, trying to suspend judgment and repress what I knew as a person. The other part of my brain, the woman-in-me, the mother-in-me, had personally witnessed the bonding, love, attachment, and connection between Robby and Jessi. Part of me knew that Robby was Jessi's mother, but part of me also denied that she was her mother.

When I speak about this case, I often say that mental health professionals think those of us in the legal profession are nuts. How could we imagine separating a child from the people whom she loves as her parents? When I would try to explain to child therapists the legal reasons why the transfer of custody might happen, they gave me a quizzical, you-must-be-crazy, kind of look. I imagined they were thinking: "Is this really you speaking, Suellyn? You seem like such a warm, intelligent woman. How can you speak of ripping this family apart in such a cool and rational way?"

It is even worse when I try to explain the case to other mothers; mothers who are not lawyers or therapists, but women with their own children, who know plainly and clearly what makes a mother and what it would mean for a two year old to lose hers. These women look at me with complete disbelief. How is it that the law does not recognize that Robby *is* Jessi's mother and that to take her away would hurt both of them?

I confess to this apparent ability of mine to repress reality while I am practicing law for a few reasons. First, it mirrors the ability of lawmakers and judges to repress reality when they are making and applying law. Second, it suggests a need to apply the feminist method of looking at the real stories behind people's lives to the question of defining family relationships.[3] For instance, have we ever forced

3. *See* Gary Minda, *The Jurisprudential Movements of the 1980's*, 50 OHIO ST. L.J. 599, 601 (1989) (explaining that "modern feminist legal theory seeks . . . to establish a distinct . . . jurisprudence by developing insights and theoretical criticism from perspectives shaped by the lived-experiences of women whose interest feminist theory seeks to affirm") (citing Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635,

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ourselves to look at the reality of children's lives? What would Jessica's or Robby's narrative look like? Third, it challenges us to create remedies for child custody cases which will recognize the reality of children's lives.[4]

How is it that the law could completely ignore Jessica's loss of the only parents she ever knew and the impact that loss had on her? The law in question in this case is law that treats the biological link between parent and child as sacred. In my particular case, the Iowa courts interpreted the Iowa Adoption Act to require that the custody be given to the biological father since he never consented to the adoption.[5] Dan Schmidt owned her by reason of his biological link, even though he was not married to the biological mother, even though he worked at the same place as the mother during the pregnancy and never asked her if the baby was his, and even though the mother named another man as the father at birth.[6] Jessica now lives with Dan because the courts held that he had an absolute right to her custody unless he was unfit.[7] His failure to adequately parent his two older children in the past was deemed irrelevant.[8] To Jessica, Dan Schmidt was a stranger.

At the time Robby and Jan took custody of Jessi, her biological mother, Cara, was engaged to someone other than Dan Schmidt.[9] She later told Dan about Jessi's birth and placement for adoption. When Jessi was fourteen months old, Cara married Dan Schmidt.[10]

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643 (1983)).

4. *See generally* James G. O'Keefe, Note, *The Need to Consider Children's Rights in Biological Parent v. Third Party Custody Disputes*, 67 CHI. KENT. L. REV. 1077, 1081 (1991) (suggesting that the child's welfare is best served by taking into consideration the child's "psychological and emotional" attachment to the person the child perceives to be his or her parent.); *see also* Gregory S. Hilderbran, *Parents, Children, and the Courts: Balancing Three Competing Interests in Third Party Adoptions*, 22 GA. L. REV. 1217, 1221 (1988) (arguing that both parental relationships should be treated equally and that the focus in establishing a remedy should be on the child's needs and interests).

5. *See In re* B.G.C., 496 N.W.2d 239, 244 (Iowa 1992) (citing The Iowa Adoption Act, IOWA CODE ANN. § 600A.8 (West 1991)) (rejecting the DeBoer's argument that there does not have to be a specific reason for the termination of parental rights and interpreting the Iowa Code to require a specific basis for the termination of those rights).

6. *In re B.G.C.*, 496 N.W.2d at 247.

7. *DeBoer*, 502 N.W.2d at 665 (holding that absent a showing of parental unfitness, the birth parent has a right to custody of the minor child regardless of the preference or best interest of the child).

8. *In re B.G.C.*, 496 N.W.2d at 245 (holding that there was not enough evidence to establish that Dan Schmidt abandoned Jessica). *But see id.* at 246 (Snell, J., dissenting) (noting that Dan Schmidt "in every meaningful way . . . abandoned" his children by failing to emotionally or financially support them).

9. *See* Michele Ingrassia and Karen Springen, *She's Not Baby Jessica Anymore*, NEWSWEEK, Mar. 21, 1994, at 63 (stating that Cara Clausen was engaged to a truck driver named Scott Seefeldt at the time of her pregnancy); *DeBoer*, 502 N.W.2d at 652 (noting that Cara Clausen had named Scott Seefeldt as the father of the child).

10. *DeBoer*, 502 N.W.2d at 562.

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When Jessi was two years old, the Iowa courts reinstated Cara's parental rights to Jessi because Cara married Dan and because Dan was granted legal custody.[11] The woman who gave birth to Jessica, and then lost her rights to Jessica by placing her for adoption, was once again Jessica's legal mother. To Jessica, Cara Schmidt was a stranger.

Even though they were strangers to Jessica, the law made Dan and Cara Schmidt her parents.[12] The courts moved Jessica from one home to the other, explicitly finding that any harm to the child caused by the change of custody was irrelevant.[13] The trial judge in Michigan, who found by clear and convincing evidence that it was in Jessi's best interest to stay with Robby and Jan, was soundly reversed.[14]

The appellate courts held that the judge should not have considered the child's interests; it was legal error to consider the reality of Jessica's life.[15]

The law, in deciding that the Schmidts had an absolute right to custody of Jessi, further distorted reality by permitting the Schmidts to pretend that the first two years of Jessi's life did not happen.[16] The law provided no middle ground, no way to order ongoing contact between Jan and Robby and Jessi.[17] Robby was Jessi's mother on August 2 until two p.m., and then Cara was her mother. Our ability as lawyers to design legal fictions fuels the desire of the biological parents to erase the child's years with the other parents. The Michigan Supreme Court, for instance, held that because the DeBoers filed their Michigan case a few hours after the Iowa Court had terminated their legal guardianship of Jessi, Robby and Jan had no

11. *In re B.G.C.*, 496 N.W.2d at 241.

12. *DeBoer*, 502 N.W.2d at 667.

13. *Id.* at 666 (finding that a biological parent has a right to custody despite acknowledgement of the "long-established rule that the best interest of the child is of paramount importance"); *see also In Interest of B.G.C.*, 496 N.W.2d at 245 (holding that the courts cannot deny biological parents custody simply for the welfare of the child where the biological parents did not consent to the adoption).

14. *DeBoer*, 502 N.W.2d at 667.

15. *See* DeBoer v. Schmidt, 501 N.W.2d 193, 196 (Mich. Ct. App. 1993) (rejecting the argument that the Michigan court could change the Iowa court's ruling based on a best interests of the child analysis).

16. *DeBoer*, 502 N.W.2d at 666 (citing Herstman v. Shiftan, 108 N.W.2d 869 (Mich. 1961)) (stating that parents have a "natural right" to their children and that this right should be given "great consideration" and should not be taken away without a showing of "extremely good cause").

17. *Compare* O'Keefe, *supra* note 4 (suggesting that it is in the best interest of the child to maintain contact with both parents).

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standing to claim custody of Jessi in Michigan.[18] Within a few hours, Robby and Jan had been stripped of all legal claim to parenthood, even though, in reality, they continued to function as Jessi's parents.

Because the law permits this bright line — one day I am a mother, the next day I'm not — the Schmidts were free to impose their own rendition of reality on Jessica. The best example of this was changing her name. The Schmidts felt that Jessi should have been theirs since birth. They, as legal parents, therefore, had the right to name her: to put their seal of ownership on her. They clearly had every intention of calling her Anna and revealed this to the press prior to the trial in Michigan.[19] When they heard at trial that the experts in child psychology were saying that it would be terrible for Jessi to lose another part of her identity, they testified that they would not change her name. But, after one of their visits with Jessi before the transfer, Cara Schmidt left some of her notes at Robby's house. At the top of the page, were the words: "Things to do for Anna." Robby was heartbroken; they had every intention of changing her name. By December, four months after her move to Iowa, the media reported that the name change was complete.[20]

Although a name is only a word, it holds great significance for us. In Patty Duke's autobiography, ironically titled *Call Me Anna*, Duke described her feelings after her new caretakers, the Rosses, gave her a new name:[21]

> [W]hen the Rosses said, 'Anna Marie's dead, you're Patty now,' it was as if she really did die. When people take away your name, they are taking away your identity. That may seem like a lot of fuss over a bunch of letters strung together, but your name is an important symbol. What has happened to that Anna Marie person, I wanted to know. Could she be dead? Where'd she go? . . . I felt as if they'd killed part of me, and in truth they had.[22]

The law created a family for Jessica at birth. The law told Jan and Robby to take this new baby to another state and to love her as their own. The courts left her in the legal custody of Jan and Robby for

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18. *See DeBoer*, 502 N.W.2d at 661 (upholding the Michigan Court of Appeals' ruling that the DeBoer's lacked standing since their parental rights were terminated when Dan Schmidt was granted custody). The court also cautioned that another court's ruling in a child custody case should not be modified where that court exercised jurisdiction properly. *Id.* at 655 n.21 (citing the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A(a) (1988)).

19. Nancy Gibbs, *In Whose Best Interest?*, TIME, July 19, 1993, at 44, 50.

20. *See Baby Jessica*, PEOPLE, Dec. 27, 1993, at 69 (reporting that Baby Jessica was now named Anna Lee Schmidt).

21. PATTY DUKE AND KENNETH TURAN, CALL ME ANNA: THE AUTOBIOGRAPHY OF PATTY DUKE 28 (Bantam 1987).

22. *Id.*

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two years after the Schmidts first contested the adoption. Then the law, through the courts, said to Jessica, "Sorry, our mistake, you belong to a different family. Go back to Iowa."[23] They might as well have said, "Do not pass go. Do not collect $200." The courts considered the rules of the game, without reference to how the rules affected Jessica's life. The court was able to repress reality and enforce the rules of the game. They declared a new mother for Jessica, ignoring the reality of her life — a reality that already included a different mother. In the name of protecting a biological family which didn't even exist at the time of the child's birth, the courts destroyed Robby, Jan and Jessica's true and loving family.

I want to turn to the ways in which the law fails to reflect the lives of non-biological parents. I used to say that I was representing the invisible clients, Robby and Jan DeBoer. This may sound odd to you, since Robby and Jan appeared often on television and in print, and regularly had the opportunity to express their concern over Jessica's fate and to express their own fears and pain.[24] The media gave Robby and Jan a strong public voice. But it was a different story in the halls of justice. Under the law, the DeBoers were invisible.

How would it affect Jan and Robby to lose their case? Listen to some of the predictions made in December of 1992 by a psychologist who specializes in treating parents dealing with grief:

> [T]he DeBoers will experience the loss of [Jessica] much like parents experience the death of a child, in that they will experience the total loss of a child whom they have come to love and have cared for as their own. As an infertile couple, seeking to parent, they were primed to attach to their adopted daughter as if she was their own biological child, so that they will suffer the same psycho-

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23. *In re B.G.C.*, 496 N.W.2d 239; *DeBoer*, 502 N.W.2d at 655-57 (deciding that as a result of the Uniform Child Custody Jurisdiction Act, adopted by Michigan as MICH. COMP. LAWS § 600.651, MICH. STAT. ANN. § 27A.651 (Callaghan Supp. 1994), and the Parental Prevention Kidnapping Act, 28 U.S.C. § 1738A, the Michigan courts must enforce the decisions of the original state, Iowa, and can only modify the decision if the original state no longer has jurisdiction).

24. *See, e.g.*, Geoffrey Cowley and Karen Springen, *Learning to Live Without Jessi*, NEWSWEEK, Mar. 21, 1994, at 63 (describing rallies of support for the DeBoers); John Taylor, *Biological Imperative; Child Custody Case over Baby Jessi; The National Interest*, N.Y. MAGAZINE, Aug. 16, 1993, at 12 (reporting the nation's overwhelming sympathy for the DeBoer's and its outrage at the court's decision to give Baby Jessi to the Schmidt family); *see also* Nancy Gibbs, *In Whose Best Interest?*, TIME, July 19, 1993, at 44 (providing an overview of the Baby Jessica incident); Kathleen Parker, *Baby Jessica Ruling Lacks Common Sense*, THE HOUSTON CHRONICLE, July 22, 1993, at 1 (supporting the DeBoer family); *cf.*, Mona Charen, *Media Adopts Revisionist History in Baby Jessica Case*, ROCKY MOUNTAIN NEWS, Mar. 24, 1994, at 45A (criticizing the media for supporting the Schmidts after the trial); *but see* Gail Pennington, *Baby Jessica Story is Gospel According to DeBoers*, ST. LOUIS POST-DISPATCH, Sept. 26, 1993, at 6C (offering a disapproving critique of a television drama based on Baby Jessi because it was biased towards the DeBoers).

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logical loss as would biological parents who had raised a child for two years and suddenly lost her. Such a death is viewed as among the most devastating losses and catastrophic events . . . I expect the DeBoers to suffer the following harms:

a. Severe depression . . . b. Rage . . . due to their perceived unfairness of a system that allowed them to bond to a child and then took her away . . . c. Total helplessness — Unlike [sic] birth parents who choose to relinquish a child for adoption to a perceived better situation, the DeBoers would be compelled to return [Jessica] to parents who did not choose to parent her initially (in the birth mother's case) or has [sic] a poor parenting record (in the birth father's case). They believe [Jessica] will suffer psychological trauma and lasting harm due to the transfer of custody and they will be helpless to assist her . . . d. As the child's psychological parents, the DeBoers will suffer knowing the child is suffering. In this sense, this loss is actually much worse than the death of a child when a bereaved parent can at least find some solace in the child no longer suffering. It is more like the grief following kidnapped or missing children, extending without end . . . e. Loss of self esteem — complete destruction of their image of themselves as good parents.[25]

Robby and Jan had strong familial ties with a child. The loss of that child would devastate them. They had no legal right to protect that relationship. We have a long, often-repeated history of protecting the rights of adults to protect their biological relationships with children.[26] In the one case in which the Supreme Court might have recognized the same right to protect one's family for children and non-biological parents, the Court decided not to decide. Unfortunately, even though the Justices withheld judgment on the question of whether persons other than biological parents have the right to protect their families, the Justices made comments on these potential rights. The dicta of the case called *Smith v. Offer*[27] is cited regularly.

25. Affidavit of Irving G. Leon, Ph.D., at 3-5 (on file with *The American University Journal of Gender & the Law*).

26. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973) (holding that the right of privacy also protects a woman's decision to terminate a pregnancy); Griswold v. Connecticut, 381 U.S. 479 (1965) (noting that procreation is a fundamental right); *In re* J.C.P., 307 S.E.2d 13 (Ga. 1983) (holding that the standard to end a parent-child relationship must be clear and convincing evidence under compelling circumstances); Roche v. Roche, 152 P.2d 999 (Cal. 1944) (deciding that parenthood is a natural right); Bond v. Norwood, 24 S.E.2d 289, 292 (Ga. 1943) (stating that the child's best interests lie with the natural father). *See also* Steven A. v. Rickie M., 823 P.2d 1216 (Cal. 1992) (deciding that a biological father may withhold his consent for the adoption of his child who is born out of wedlock); Durr v. Blue, 454 So. 2d 315 (La. Ct. App. 1984) (affirming a lower court order which ruled that the biological father of three children could have custody, rendering the adoption proceedings null and void).

27. 431 U.S. 816 (1977).

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One quotation from the case recognizes the strong bond which could exist without a blood relationship, noting that our protection of marriage is not based on biological ties, and stating that at some point these non-biological family members may have a constitutional right to protect their relationship.[28] On the other hand, the Court provided a quotation which says that non-biological parents pitted against biological parents will nearly always lose.[29] So, we lawyers argue about what the *Smith* case actually said about the rights of psychological parents. The truth is, the Supreme Court has never decided whether a child or her non-biological parents have a constitutional right to protect their loving relationship with each other.[30] We decided not to pursue our case in the United States Supreme Court after Jessi was transferred to Iowa. We did not want to transfer Jessi again after she settled with the Schmidts, and we were concerned that legally our case had too many complications. Because of the interstate battle between Michigan and Iowa, the question of the constitutional rights of Jessi and Robby and Jan would not be central to a United States Supreme Court case.[31]

There are two similar cases pending in the supreme courts of Illinois and New Mexico: the Baby Richard case in Illinois[32] and the Roth case in New Mexico.[33] Hopefully, the supreme courts of those states will recognize the humanity of the children involved and allow them to stay with the only parents they have ever known. If not, those cases may be ripe for review by the United States Supreme Court.[34] I believe we should be cautious about asking the current Supreme Court to recognize fundamental interests in non-biological families. The Justice most likely to recognize such an interest, Justice Blackmun, is retiring from the Bench,[35] and there is certainly no

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28. *Id.* at 843.

29. *Id.* at 847.

30. *See* Suzette M. Haynie, *Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected?*, 20 GA. L. REV. 705, 706 (1986).

31. *DeBoer*, 502 N.W.2d 649 (discussing the interstate battle between Iowa and Michigan's jurisdiction as it pertains to child custody laws throughout the bulk of the opinion).

32. *In re* Doe, 627 N.E.2d 648 (Ill. App. Ct. 1993), *petition for leave to appeal allowed*, Dec. 1, 1993 (stating that a child's best interests are paramount in a case where the court ruled that the biological father was unfit and custody was given to the adoptive parents).

33. Roth v. Bookert, 868 P.2d 1256 (N.M. Ct. App. 1993), *cert. granted*, 869 P.2d 820 (N.M. 1994) (holding that the biological father could stop adoption proceedings because he had not abandoned his child and, therefore, was not found an unfit parent by the court).

34. The Baby Richard adoption has been reversed since the time of Professor Scarnecchia's speech and the attorneys for Richard have filed for certiorari to the United States Supreme Court. *In re* Petition of Doe, 159 Ill.2d 347, No. 76063 1994 WL 265086 (Ill. Jun. 16, 1994), *reh'g denied*, (July 12, 1994), *petition for cert. filed*, 63 U.S.L.W. 3109 (U.S. Aug. 9, 1994) (No. 94-236).

35. Justice Blackmun announced his retirement on April 6, 1994. Ruth Marcus, *Justice Blackmun Announces Retirement Succession Talk Focuses Largely on Sen. Mitchell*, WASH. POST, Apr. 7,

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strong force existing on the Court to recognize any "new" constitutional rights.[36]

The inability of the law to recognize Robby and Jan as Jessi's parents may not reflect the reality of their lives, but it does reflect our society's strong prejudice against non-biological parents. In Elizabeth Bartholet's chapter entitled "Adoption and Stigma" in her book *Family Bonds*, she writes:

> The stigma surrounding adoption is so pervasive that most people are unaware of its existence; it is part of the air we breathe, part of the atmosphere of our daily existence. But with adoptive parenthood comes a new consciousness, and as time passes you feel successive jars of recognition. You see and hear and feel the stigma because you and your family have become the alien outsiders — the object of the stigma.[37]

Professor Bartholet goes on to remind us of the stories of our childhood, fairy tales in which the non-biological parent is always the cruel and frightening adult who can not be trusted. She describes the many disturbing and insensitive comments strangers and friends make about her two adopted sons.[38]

I am not an adoptive parent, but having invested much heart and soul in Jessica's case, I find that I too have suddenly gained the consciousness Professor Bartholet describes. Now that I am aware of the stigma, I hear it everywhere.

Here's an example: I was eating lunch with Robby DeBoer and George Russ after a children's rights rally in Michigan. George is the adoptive father of Gregory K., the boy who became famous for divorcing his mother in Florida so that he could have a permanent adoptive home.[39] George is also a lawyer and he represented Kimberly Mays in her case in Florida when she attempted to terminate her biological parents' rights.[40] If anyone is sensitive to recognizing

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1994, at A1.

36. DeBoer v. Schmidt, 114 S. Ct. 11 (1993) (Blackmun, J. dissenting from a denial to stay the Baby Jessi decision).

37. ELIZABETH BARTHOLET, FAMILY BONDS 165 (1993).

38. *Id.* at 165 n.2 (discussing the common thread in Western folk tales such as, Rapunzel, Hanzel and Gretel, Snow White, and Cinderella, that unreasonably casts non-blood related child caretakers as evil beings). *Id.* at 166 (referring to the story of Moses, who is raised in the house of the Pharaoh, and later returns to free the Jews from Egypt). *Id.* at 167 (relating examples of how her own children are stigmatized by statements such as, "Are they brothers?" and "How does your own child feel about them?").

39. Kingsley v. Kingsley, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993), *petition for review denied*, 1994 Fla. App. LEXIS 164 (Fla. 1994) (terminating a biological mother's parental rights upon the request of her son, who wished to be adopted by his foster parents).

40. *See* Twigg v. Mays, 543 So. 2d 241 (Fla. Cir. Ct. 1989), *rev'd*, No. 88-4489-CA-01, 1993 WL 330624 (Fla. Cir. Ct. Aug. 18, 1993) (examining the case of Kimberly Mays who was switched at birth and asked the court to terminate the rights of her birth parents).

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that an adoptive family is a real family, it's George. So Robby, George and I are eating lunch and George is telling us about a lawyer in Florida who has several children. I can't remember the exact numbers, but George said something like this: "Yes, he has ten kids, four are adopted and six are the Real McCoy." I quickly ducked into my salad, wondering if this unfortunate slip would go unnoticed. Of course not. Robby turned to George and said: "Now George, you know they're *all* the Real McCoy." George's face turned red, and we all laughed and teased him. I like this story because it illustrates how ingrained it is in our collective consciousness to carefully differentiate birth children from adopted children.

So, we should not be too terribly surprised that our law still fails to recognize Jan and Robby as parents with valid claims when we, as a society, have not yet come to terms with our bias against nonbiological families.

As a clinical law professor, I can't leave you with only these reflections. I am compelled to add what I think these thoughts mean to the law and to the practice of law. State law must be reformed, where necessary, to guarantee three things. First, that children's cases are decided quickly — we may need a triage system which would prioritize children's cases, on a case-by-case basis, to determine their relative need for expedited process. Second, that once a child's fate lies in the hands of a court, once her custody cannot be determined privately between the adults in her life, then the court must be permitted to consider how the proposed custody arrangement directly affects the child. Third, that the law must acknowledge the very real parent-child relationships that can exist between children and nonbiological parents, by giving a child's psychological parents the right to sue for custody.

Here are the restrictions I would put on a non-biological parent's right to sue: this parent must have had actual custody of the child for a significant period of time; she could not sue to remove the child from an intact biological home; and in most cases, the biological parent would possess a presumption in her favor which must be overcome by clear and convincing evidence. We might also consider applying a test for custody which is narrower than the best interests of the child: perhaps Goldstein, Freud, and Solnit's "least detrimental alternative" test.[41]

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41. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 6 (1979) ("The least detrimental alternative . . . is that specific placement and procedure which maximizes, in accord with the child's sense of time on the basis of short-term predictions given the limitations of knowledge, his or her opportunity for being wanted and for

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These restrictions on a non-biological parent's right to sue for custody would defend against fears that children would be removed from intact biological families by others who think they can do a better job at parenting the children. And, these restrictions would allow a biological parent to leave a child with others temporarily, with a legal presumption that the child would be returned unless the return would be detrimental to the child. But there should never be a rule that biological parents can automatically repossess their children like property, without any reference to how the change of custody will affect the live little person involved.

If state legislatures won't take these steps, then courts should impose them by recognizing the fundamental constitutional right of children and their psychological parents to protect their mutual relationships.

Finally, Robby, Jan and Jessica's case reminded me once again of the behind-the-scenes duty of lawyers: to counsel our clients wisely and diligently pursue compromise and settlement. There will always be cases where a child has two or more parents fighting for the privilege of caring for her. If we are truly dedicated to recognizing the reality of children's lives, we *must* acknowledge that a winner versus loser approach to custody cases is unrealistic and won't work. We must push our clients, the parents, to talk with each other, to acknowledge that the child needs all of them, and that compromise is almost always in the child's best interests.

To conclude, I would like to make a suggestion especially fitting at a symposium sponsored by a gender and law journal. It is my belief that women lawyers, women law professors, women judges, women legislators, and women activists will be essential to change the law and practice of law to accurately reflect children's reality. Dana and Rand Jack, in their article about women lawyers, cite a study by Piaget in 1932. They write:

> [Piaget] noted marked gender differences, especially in how children related to game rules. Boys stuck to the rules, resorting only to 'legal elaborations,' while girls emphasized harmony and invented new rules to suit their play . . . When faced with an argument over the rules, girls ended the game, starting over or finding something else to do; boys argued their way through the dispute with continual reference to 'the rules of the game.' Girls

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maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent.").

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sought to preserve the relationships of the players, while the boys maintained the rules.[42]

If we are anything like the girls Piaget studied in 1932, and I believe many of us, (both men and women) are, we will make many contributions to the effort to make the legal system for children less of a game controlled by strict and sometimes arbitrary rules and more like a game which ebbs and flows and changes to reflect the reality of the lives of its players.

42. DANA JACK & RAND JACK, *Women Lawyers: Archetype and Alternatives*, *in* MAPPING THE MORAL DOMAIN 264 (Carol Gilligan, Janie Victoria Ward & Jill McLean Taylor with Betty Bardige eds., 1988).

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